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Donna N. Lampert

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May 28, 1996

EX PARTE

BY HAND
William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: CS Docket No. 96-46
Implementation of Section 302 of the Telecommunications Act of 1996

Dear Mr. Caton:

On May 28, 1996, on behalf of Rainbow Programming Holdings, Inc., Sheila Mahony (Senior Vice President - Communications And Public Affairs) of Cablevision Systems Corporation; Andrea Greenberg (Senior Vice President - Business Affairs) of Rainbow Programming Holdings, Inc.; and I met with James W. Olson, Chief, and Martin L. Stern, Deputy Chief, both of the Competition Division, Office of General Counsel, to discuss the Commission's program access rules and Open Video Systems.

Pursuant to Section 1.1206(a)(1) of the Commission's Rules, two copies of the written documents discussed or distributed are attached for inclusion in the public record in the above-captioned proceedings.

Should you have any questions regarding this matter, please contact me.

Sincerely,

Donna N. Lampert

cc: James W. Olson (w/encl.)
Martin L. Stern (w/encl.)

F1/53712.1

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May 10, 1996

EX PARTE

BY HAND
William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Cable Services Docket No. 96-46: Open Video Systems

Dear Mr. Caton:

Please accept for inclusion in the record of the above-referenced proceeding the attached letter to Chairman Reed E. Hundt from Sheila Mahony, Rainbow Programming Holdings, Inc.

We are submitting two copies of this notice in accordance with Section 1.1206(a)(1) of the Commission's Rules.

Should you have any questions regarding this matter, please contact me.

Sincerely,

Donna N. Lampert

cc: Commissioner Quello
Commissioner Ness
Commissioner Chong
Meredith Jones
Blair Levin
Jackie Chorney
John Nakahata
Pete Belvin
Mary McManus
Suzanne Toller
John E. Logan
Reed E. Hundt

The Networks of
Rainbow Programming Holdings, Inc.

AMERICAN MOVIE CLASSICS
BRAVO
THE INDEPENDENT FILM CHANNEL
MUCHMUSIC
NEWS 12
NEWSPORT
PRIME
ROMANCE CLASSICS
SPORTSCHANNEL

May 10, 1996

Chairman Reed E. Hundt
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, D.C. 20554

Re: Cable Services Docket No. 96-46: Open Video Systems

Dear Chairman Hundt:

On behalf of Rainbow Programming Holdings, Inc., thank you for the recent opportunity to discuss Open Video Systems ("OVS") and the applicability of the Commission's Program Access rules[1/] to that service. While many commenters in the Open Video Systems docket[2/] have expressed their particular views about the Program Access rules and their relationship to OVS, the plain language of the 1996 Telecommunications Act ("1996 Act") is clear insofar as it addresses the applicability of these rules to OVS. The 1996 Act applies the Program Access rules solely to OVS operators in order to prevent vertically integrated OVS operators from discriminating against their competitors in the supply of their programming. The 1996 Act does not, however, extend the Program Access rules generally to OVS programmers. Moreover, as we discussed, in light of the compelling public policies that underlie OVS, including reliance upon the free market to promote diversity and robust competition, the Commission should not extend the rules beyond the scope set forth in the 1996 Act.

Pursuant to Section 653 of the 1996 Act, which establishes open video systems, "[a]ny provision that applies to a cable operator under [Section] 628 . . . of this title, shall

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[1/] 47 C.F.R. Subpart O, "Competitive Access to Cable Programming." §§76.1000-.1003 ("the rules" or "the Program Access rules").

[2/] Notice of Proposed Rulemaking, Cable Services Docket No. 96-46, released March 11, 1996 ("Notice").

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apply" to "any operator of an [approved] open video system."[3] Thus, the 1996 Act extends the Program Access rules -- and the obligations that apply to cable operators -- to OVS operators and not to anyone else. It is axiomatic that where the plain language of the statute is clear and unambiguous, there is no reason to look elsewhere for assistance in interpreting its meaning.[4] In fact, there is nothing in the text of the 1996 Act or in the relevant legislative history that refers to a new right of access to programming for OVS programmers. If Congress had intended to apply the Program Access rules to OVS programmers, it would have expressly done so in the 1996 Act, as it did elsewhere in imposing obligations upon OVS programmers.[5]

As you are aware, the requirements of Section 628 and the FCC's rules impose certain obligations on cable operators that are vertically integrated with cable programming suppliers.[6] Those provisions require cable operators, among other obligations, to deal fairly with and not discriminate against competing multichannel video programming distributors ("MVPDs").[7] The plain language of the 1996 Act applies these same obligations to open video system operators and their vertically integrated programming suppliers.[8] Thus, for example, an MVPD could file a program access complaint against a vertically integrated OVS operator in order to secure the OVS operator's programming, just as an MVPD has a right to do with a vertically-integrated cable operator. What the 1996 Act does not do, however, is provide OVS "customer-programmers" with any new rights under the Program Access rules to obtain programming from another programmer, whether or not that other programmer is vertically integrated with a cable operator. Rather, Congress intended for consumers to have access to diverse programming on open video systems by subscribing to the offerings of one or more programmers utilizing the open platform mandated by Section 653. OVS programmers will compete with each other on this platform

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[3] 47 U.S.C. § 549(c)(1)(A).

[4] See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982).

[5] Thus, in setting forth the parameters of OVS regulation, Congress explicitly stated that the syndicated exclusivity, network nonduplication and sports exclusivity rules should apply to the "distribution of video programming over open video systems." See 47 U.S.C. Section 653 (b)(1)(D). Clearly, Congress knew how to extend obligations beyond OVS operators when it so intended.

[6] See generally 47 U.S.C. § 548.

[7] 47 U.S.C. §§ 548(b), (c)(2)(B).

[8] See 47 U.S.C. § 549(c)(1)(A).

on an equal basis, allowing market forces to promote diversity and determine the success of each programmer's offerings.

A contrary interpretation of the 1996 Act would have the perverse effect of undermining the new OVS regime that is delineated in the 1996 Act. Under the OVS framework, basic tenets of nondiscrimination among programmers and open access are paramount.[9/] The underlying rationale for this framework, as the FCC has recognized in its pending Notice,[10/] is that all programmers have a right to exercise control over their product and utilize OVS to offer consumers their particular mix of programming and services. If the FCC were to extend its rules to compel video programmers to make their product available to other competing programmers, video programmers would lose any incentive to utilize OVS themselves. Rather than enhancing the ability of OVS to bring diverse programming voices to the consumer, expanding the program access provisions in this manner would directly undermine competition. Moreover, if programmers are deterred from using the OVS platform, there is a real and substantial risk that OVS will develop as little more than a de facto, unfranchised cable system. Certainly such was not the intent of Congress.[11/]

As you fashion the rules that will govern the development, deployment and regulation of OVS, we urge you to ensure that each competitor on an open video system is the equal of every other with respect to access to the platform. Such a result is wholly consistent with the 1996 Act and sound public policy. Allowing any programmer to use the Program Access rules against its competitors on an open video system runs directly contrary to the plain meaning of the 1996 Act, the intent of Congress, and the sound functioning of a competitive, nondiscriminatory video programming delivery system.

Finally, we want to take this opportunity to address several points that were raised at out meeting. First, with respect to price regulation, we believe that as long as the FCC requires proper cost allocation, so that the OVS operator bears its full costs, the FCC should not regulate OVS rates but rather let the just and reasonable standard govern. Second, the FCC should not permit OVS operators to require joint marketing of services as a condition

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[9/] See 47 U.S.C. §§ 573(b)(1)(A)-(E).

[10/] See Notice, Cable Services Docket No. 96-46, at para. 41.

[11/] We do note, in addition, that while there is no difference in the basic legal and statutory arguments with respect to in-region and out-of-region applicability of the Program Access rules to OVS programmers, a rule that makes such a distinction would have much less risk of thwarting and undermining OVS, as the vertically-integrated programmer would almost always have an opportunity to deliver its programming to consumers.

for programmers' access. Requiring programmers to cede their marketing efforts to OVS operators is wholly inconsistent with the open, nondiscriminatory premise of OVS that is designed to promote diversity. Programmers must be permitted to retain complete control over their programming delivery, including all aspects of marketing. Of course, independent programmers are always free to enter voluntarily into marketing arrangements with OVS operators or others. Lastly, as to whether the FCC should distinguish in its rules, in whole or in part, between the provision of analog and digital channel capacity, the FCC should treat analog and digital capacity separately, as they are not wholly substitutable. To the extent the FCC adopts rules detailing capacity limits, allocation procedures, and other related aspects, they should apply separately to both digital and analog capacity.

As we have demonstrated, Rainbow remains extremely interested in exploring the potential of Open Video Systems and other new video delivery mechanisms that will allow us to provide consumers with the benefits of our vast experience in the programming marketplace and the unique and exciting products we have developed. To do so, however, the rules that the FCC adopts should encourage, rather than discourage, our participation. Thank you for the opportunity to discuss these issues with you. Should you have any questions, please do not hesitate to contact us.

Sincerely,

Sheila Mahony

cc: Commissioner Quello
Commissioner Ness
Commissioner Chong
Meredith Jones
Blair Levin
Jackie Chorney
John Nakahata
Pete Belvin
Mary McManus
Suzanne Toller
John E. Logan

EX PARTE FILING OF RAINBOW PROGRAMMING HOLDINGS, INC. IN CABLE SERVICES DOCKET NO. 96-46

THE PROGRAM ACCESS RULES SHOULD NOT APPLY TO OVS PROGRAMMERS

Application of the Program Access Rules to Programmers Utilizing OVS is Inconsistent With the OVS Framework.

The bedrock premise of OVS is that all video programmers will have the opportunity to compete on equal terms and will be able to market their own program offerings to consumers.

- Congress intended for market forces to promote diversity and robust competition.

- The Commission correctly recognized that programmers have a right to exercise control over their own product (NPRM at ¶ 41), which applies not only with respect to channel sharing but to the ability of programmers to package and market their product.

Permitting OVS programmers to use the program access rules to secure programming will skew the competitive market by unfairly benefiting favored programmers and will thwart the success of OVS.

Rainbow's experience has shown that it is likely that OVS operators will seek to discriminate against unaffiliated programmers in capacity allocation and then seek to utilize the program access rules to compel programming that can be used by their affiliated and favored programmers. (SNET, US WEST, Bell Atlantic)

Allowing OVS programmers to compel competitors' programming will reduce the incentives for potential new programmers to use OVS since their programming would already be available on the platform.

The Law Does Not Require Nor Did Congress Intend for the Program Access Rules to Apply to OVS Programmers.

Congress did not intend to undermine OVS by requiring video programmers to sell their programming to their competitors on open video systems.